

LAW OF THE SEA DISPUTE SETTLEMENT: PAST, PRESENT, AND FUTURE

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For some, the vision of international courts able to issue binding rules of decision and clarify the meaning of rules of international law has had great pull. For example, Hersch Lauterpacht urged that the International Court of Justice (hereinafter ICJ) be given wide powers, and argued that international courts and tribunals should treat even problems involving the vital interests of states as justiciable.¹ With respect to the law of the sea in particular, some have proposed that an international court exercise broad jurisdiction. In Arvid Pardo's 1971 draft treaty, which proposed an intergovernmental institution to govern ocean spaces, an International Maritime Court was to play a central role.² This Court was to have jurisdiction over individuals and corporations, as well as states, "with respect to matters . . . in International Ocean Space."³

Although no general Ocean Space institution emerged from the Third United Nations Conference on the Law of the Sea (hereinafter UNCLOS III), the 1982 United Nations Convention on the Law of the Sea⁴ does contain innovative provisions concerning dispute settlement. Even while denying the need for an intergovernmental organization with broad powers, some states at UNCLOS III favored a strong third-party system of dispute

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1. See, e.g., Hersch Lauterpacht, *Some Observations on the Prohibition of Non Liqueur, and the Completeness of Law*, in 2 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCHE LAUTERPACHT 213 (E. Lauterpacht ed., 1975). For a summary of Lauterpacht's views, see MANFRED LACHS, *THE TEACHER IN INTERNATIONAL LAW* 113-15 (2d rev. ed. 1987).

2. Draft ocean space treaty: Working paper submitted by Malta, U.N. Doc. A/AC.138/53 (1971), reprinted in *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, U.N. GAOR, 26th year, Supp. No. 21, at 105-93, U.N. Doc. A/8421 (1971), and in STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, *REPORT ON THE UNITED NATIONS SEABED COMMITTEE, THE OUTER CONTINENTAL SHELF AND MARINE MINERAL DEVELOPMENT* 168 (Comm. Print 1971) [hereinafter *Draft Ocean Space Treaty*]. See Louis B. Sohn, *Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea*, 36 COLUM. J. TRANSNAT'L L. 285, 291-92 (1997).

3. Draft Open Space Treaty, *supra* note 2, art. 161.

4. *Opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982) [hereinafter *Law of the Sea Convention*].

settlement as a means to help reinforce Convention norms.⁵ States favoring a strong dispute settlement system, states expressing skepticism about submitting disputes to third-party fora, and states seeking to have particular issues exempted from compulsory third-party dispute settlement engaged in complicated negotiations.⁶ A compromise, under which many disputes may be subject to compulsory binding arbitration or adjudication, emerged from UNCLOS III. My remarks first briefly outline this compromise dispute settlement system, and then analyze some of the factors bearing on the current and future uses of the Convention's third-party mechanisms.

The dispute settlement provisions of the Law of the Sea Convention are found in the text of the Convention itself, rather than in an optional protocol.⁷ The Convention calls first for informal efforts at resolving disputes. Should these fail, States Parties have a choice among four third-party dispute settlement mechanisms—arbitration, special arbitration, the ICJ, and a new International Tribunal for the Law of the Sea (hereinafter ITLOS)—to handle many disputes.⁸ If the parties to a dispute do not choose the same forum, or if they fail to make any selection, an arbitral tribunal usually has residual compulsory jurisdiction.⁹ The ITLOS, rather than an arbitral tribunal, has residual compulsory jurisdiction to order the prompt release of vessels and their crews under Article 292¹⁰ or to order provisional measures,¹¹ though in the latter case only until an arbitral tribunal (or some other forum acceptable to the parties) can be constituted. Although States Parties cannot make reservations to the Convention to avoid its dispute settlement provisions, Articles 297 and 298 do contain limitations on and optional exceptions to the requirement of binding third-party adjudication or arbitration. These limitations and exceptions affect several categories of sensitive disputes, involving, for example, military

5. The United States, for example, favored a strong dispute settlement system. See Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9 (1976).

6. For the negotiating history of the dispute settlement provisions of the Law of the Sea Convention, see A.O. ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND COMMENTARY* (1987); 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Shabtai Rosenne & Louis B. Sohn eds., 1989) [hereinafter 5 COMMENTARY].

7. Law of the Sea Convention, *supra* note 4, arts. 74(2), 83(2), 151(8), 159(10), 162(2)(u)-(v), 165(2)(i)-(j), 186-191, 264, 279-99, 302; Annex III, arts. 18(1)(b), 21(2); Annex V; Annex VI; Annex VII; Annex VIII; Annex IX, art. 7. See also *infra* note 13. Cf. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29 1958, 450 U.N.T.S. 169 (ratified by 37 states).

8. Law of the Sea Convention, *supra* note 4, art. 287. Special arbitration before panels of experts is available in cases involving fisheries, protection of the marine environment, marine scientific research, and navigation. See also *id.* art. 282.

9. See *id.* art. 287(3), (5).

10. See *id.* art. 292(1).

11. See *id.* art. 290(5).

activities, maritime boundaries, and aspects of coastal state jurisdiction in the exclusive economic zone (hereinafter EEZ) concerning living resources and marine scientific research.¹² Separate provisions apply to the settlement of disputes relating to mining activities in the sea bed beyond national jurisdiction, with respect to which a Sea-Bed Disputes Chamber of the Law of the Sea Tribunal is to play the primary role.¹³

The Law of the Sea Convention, along with its compulsory third-party dispute settlement provisions, entered into force in November 1994. The Law of the Sea Tribunal elected its twenty-one judges in 1996, and in 1997 handed down its first decision, in an Article 292 prompt release case.¹⁴ Earlier this year the Tribunal issued an order concerning a provisional measure,¹⁵ and it is currently seized with a related case in which the applicant state has raised issues of freedom of navigation, hot pursuit, and the scope of a coastal state's power to enforce its customs regulations.¹⁶

During the four years since the Convention has entered into force, states have not brought many new law of the sea cases to international courts or arbitral tribunals. Before the Convention entered into force, the ICJ and arbitral tribunals had decided several law of the sea cases, many of them brought via special agreement.¹ The baseline, as it were, of judicial and arbitral activity relating to the law of the sea has for many years been "some cases," even absent a widely adopted treaty establishing a system of compulsory jurisdiction. I do not mean that the Convention's third-party dispute settlement system has had no effect. I doubt, for example, that the first case decided by the Law of the Sea Tribunal would have been submitted to an international court without that system. But the number of

12. Some of the disputes falling within these limitations and exceptions are subject to a system of compulsory conciliation. See *id.* arts. 297(2)(b) & (3)(b), 298(1)(a), Annex V, arts. 11-14.

13. See *id.* arts. 186-91. The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 Dec. 1982, July 28, 1994, U.N. Doc. A/RES/48/263, 33 I.L.M. 1309 (1994), which modifies some of the technical and institutional features of the Convention's regime for mining the deep sea bed that developed states had found problematic, and which is to be interpreted and applied together with Part XI as a single instrument, contains a few provisions on dispute settlement. See *id.* Annex, §§ 3.12, 6.1(f)-(g), 6.4, 8.1(f), 8(2). None of these provisions affects the basic structure of dispute settlement under Part XI.

14. See *The "M/V Saiga" (Saint Vincent and the Grenadines v. Guinea)*, <http://www.un.org/Depts/los/judg_1.htm> (1997).

15. *The "M/V Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea) (Request for Provisional Measures)*, <<http://www.un.org/Depts/los/ord1103.htm>> (1998).

16. The pending case, the Article 292 decision, and the provisional order all arose from the same incident. See ITLOS/Press 17, Oct. 19, 1998; ITLOS/Press 13, Feb. 28, 1998.

17. The ICJ and its predecessor, the Permanent Court of International Justice, have handed down some 40 decisions that directly involve the law of the sea. See Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 70 n.13 (1996); Mark W. Janis, *The Law of the Sea Tribunal, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 245, 247-48 (Mark W. Janis ed., 1992).

law of the sea cases is far less than, for example, the number of international trade disputes submitted to WTO panels, which have rendered over 100 binding interstate decisions since 1994.¹⁸

What factors explain this relative lack of interstate law of the sea cases? First, many sensitive disputes have been exempted from the compulsory dispute settlement requirement under Articles 297 and 298. In such disputes, a state seeking a public third-party forum in which to air its grievances may well find none available. Second, unlike the GATT/WTO or the European human rights systems, the law of the sea has seen no experimentation with widely accepted multilateral treaty-based dispute settlement mechanisms.¹⁹ Although states have found recourse to third-party procedures useful in particular law of the sea disputes, they have not had the opportunity to try out a compulsory dispute settlement mechanism established in a widely accepted convention, or perhaps to try out different mechanisms for different types of disputes. There has been no time, following a period of use of a dispute settlement system, to discuss possible reforms and perhaps to reach consensus on the need for incremental moves toward a more formal system.

A third possible reason for the lack of many new interstate cases could relate to concerns that no one international court has exclusive authority to

18. For an overview of activity by the WTO Dispute Settlement Body, see WTO, Overview of the state-of-play of WTO disputes, <<http://www.wto.org/wto/dispute/bulletin.htm>>. For discussion of the binding nature of WTO panel decisions, see John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstanding on the Nature of Legal Obligation*, 90 AM. J. INT'L L. 60 (1997).

19. Before January 1, 1995, GATT panel decisions could be blocked by the disadvantaged state. The WTO's Dispute Settlement Understanding, Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, in General Agreements on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1125, 1216 (1994), removes that blocking option, establishes a firm timetable for cases, and creates a new appellate procedure. The significant WTO caseload has led some to argue in favor of an even more formal court with independent judges, rather than panelists selected by the parties, to decide trade disputes. See, e.g., *Presentation Summary and Comments*, 32 INT'L LAW. 883, 891 (1998) (comments of John Kingery); Alan Wm. Wolff, *Reflections on WTO Dispute Settlement*, 32 INT'L LAW. 951, 955 (1998).

Another example of an active, evolving international third-party dispute settlement system is the one created by the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. In the early years of this system, the European Commission on Human Rights screened out most cases as inadmissible, and some states refused to accept two optional Convention clauses involving (1) a right of individual petition to the Commission and (2) acceptance of the jurisdiction of the European Court of Human Rights. The system evolved, however, with all member states eventually accepting the optional clauses and the Court's caseload continually increasing. On Nov. 1, 1998, Protocol No. 11 to the Convention entered into force; this Protocol eliminates the Commission, restructures the Court to accommodate its significant caseload, and allows individuals to bring cases directly to the Court. See generally MARK JANIS ET AL., *EUROPEAN HUMAN RIGHTS LAW* (1995).

interpret the Law of the Sea Convention. If a state wants a definitive interpretation of some Convention rule, might it be discouraged from bringing a case to one forum because it recognizes the risk that different tribunals may interpret the rule in other cases, and the concomitant risk that inconsistent jurisprudence could develop? In my opinion, the concern that the variety of fora available to hear law of the sea disputes could damage the development of consistent jurisprudence—a point some have raised as a systemic criticism of the Convention²⁰—is probably overblown.²¹ It also seems more likely that, on balance, the availability of multiple fora will increase the chances that states could find a forum with a composition and procedure they like. Any state that has a dispute with another state must determine that pursuing a claim in some forum will not unacceptably upset friendly relations or disrupt negotiations on other, unrelated matters. If a variety of fora are available, however, the probability increases that at least one acceptable forum will be found, either for filing a claim unilaterally or for pursuing a ruling that, at the time the case is brought, all the parties to the dispute desire.

The extent to which the number of interstate cases involving law of the sea disputes will increase remains unclear. Certainly, as in the past, many cases will continue to be brought to a court or tribunal by special agreement.²² It may well be, however, that the Convention's dispute settlement provisions will have their main impact not in terms of new case law, but behind the scenes. For example, these provisions may deter some states from making outrageous unilateral claims that could be legally challenged before a third party, and may influence the conduct of interstate negotiations.

Although my focus thus far has been on the application of the Law of the Sea Convention's dispute settlement provisions to states, the Convention does not limit the jurisdiction of the various courts and tribunals to interstate disputes (although the Statute of the International Court of Justice provides that "[o]nly states may be parties in cases before the Court"²³). The fact that the Convention's dispute settlement mechanisms are in some situations open to

20. For discussion of some of the criticism, see Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 76-89 (1997).

21. Although different tribunals may in theory develop different legal interpretations of rules of law of the sea, one tribunal may gain a virtual monopoly over some types of cases. For example, the ITLOS, with its residuary compulsory jurisdiction under Article 292, should attract virtually all prompt releases cases. Furthermore, one should not necessarily assume that different tribunals will interpret an international law rule differently. The judges on one court or tribunal may well rely on decisions of another tribunal (although international courts and tribunals may place more reliance on their own prior decisions and on ICJ decisions than on decisions of other tribunals). See *id.* at 72-73.

22. See, e.g., INTERNATIONAL COURT OF JUSTICE PRESS COMMUNIQUÉ 98/35, Nov. 2, 1998 (Indonesia and Malaysia bring to the ICJ, by special agreement, a dispute concerning sovereignty over two islands in the Celebes Sea).

23. Statute of the International Court of Justice, art. 34(1), June 26, 1945, 59 Stat. 1031, T.S. No. 993.

non-state entities may lead to increased use of third-party fora. It is true the Convention provides no general individual right of access to courts or tribunals for wide categories of disputes. Such a right of access is a feature of some of the busiest international courts and tribunals. This lack of assured individual access is not surprising, given the historical period in which the Law of the Sea Convention was negotiated, and given the fact that the international law of the sea has not traditionally been conceptualized in terms of human rights.²⁴ But the Convention does provide several options for non-state entities to be parties to cases. Some of these options apply to disputes related to sea-bed mining contracts and other disputes arising under Part XI.²⁵ In addition, states may authorize individuals to pursue prompt release applications under Article 292.²⁶ Furthermore, because the Convention's dispute settlement provisions apply generally to "States Parties," and because the definition of "States Parties" encompasses some non-state entities, such entities may be parties in a wide range of cases.²⁷ Finally, the Statute of the Law of the Sea Tribunal could be read to allow the ITLOS to exercise jurisdiction over cases submitted pursuant to an "agreement" to which non-state entities are parties.²⁸ If the Statute were to be construed in this manner, port states and ship owners could, for example, enter into agreements to refer to the Tribunal disputes about the application of

24. That the international law of the sea has not traditionally been viewed primarily in terms of individual human rights does not mean that the Law of the Sea Convention ignores such rights. Indeed, as Professor Oxman has demonstrated, numerous Convention provisions recognize and protect civil and economic rights. See Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 399 (1997). Furthermore, courts or tribunals with jurisdiction under the Law of the Sea Convention are directed to apply not only the Convention, but "other rules of international law not incompatible with" it. Law of the Sea Convention, *supra* note 4, art. 293. These "other rules" could, in appropriate cases, include generally accepted human rights norms.

25. See Law of the Sea Convention, *supra* note 4, arts. 187(c)-(f), 190.

26. See *id.* art. 292(2) (suggesting States Parties may authorize private parties to make applications on behalf of States Parties in Article 292 prompt release proceedings); Bernard H. Oxman, *Observations on Vessel Release under the United Nations Convention on the Law of the Sea*, 11 INT'L. J. MARINE & COASTAL L. 201 (1997).

27. The definition of "States Parties" covers, for example, the European Union. See Law of the Sea Convention, *supra* note 4, arts. 1(2)(2), 305(1).

28. According to the Statute of the ITLOS, the Tribunal may exercise jurisdiction, *inter alia*, over "all matters specifically provided for in any ... agreement which confers jurisdiction on the Tribunal," *id.* Annex VI, art. 21, and entities other than States Parties have access to the Tribunal "in any case submitted pursuant to" any such agreement. *Id.* Annex VI, art. 20. As an annex to the Convention, the Statute of the ITLOS is considered an integral part of the Convention. See *id.* art. 318. However, the general jurisdictional provision of the Convention, Article 288, refers to jurisdiction pursuant to "international agreements," *i.e.*, treaties, rather than "agreements," and the Tribunal has not yet indicated that it will accept jurisdiction over non-seabed-mining disputes submitted pursuant to agreements to which natural or juridical persons are parties. See generally 5 COMMENTARY, *supra* note 6, ¶¶ A.VI.112-128.

standards of the International Maritime Organization or about Memoranda of Understanding on Port State Control.²⁹

How many cases the various fora referred to in the Law of the Sea Convention actually hear will depend in large part on how they conduct their business. For example, the ITLOS can, if it chooses, do much to build a track record that deserves respect and attracts business. The question of what the Tribunal should do to achieve these goals is not one that should be answered in the abstract. The functions it performs in, say, a maritime delimitation case will be far different from its functions in a sea-bed mining dispute involving a challenge to regulations of the Sea-Bed Authority. But let me suggest briefly a few factors that may be relevant to the acceptance of the Tribunal. The Tribunal already has set itself up as a body that can act quickly. It handed down its first decision only three weeks after the application was filed. This efficiency may help it to attract cases and to compete effectively with other available fora. The Tribunal also has established several chambers, including a Chamber on Fisheries Matters, a Chamber on the Marine Environment, and a Chamber of Summary Procedure, that are available at the request of parties to a dispute.³⁰ Parties thus may choose fora able to act more quickly than the full Tribunal, or fora whose members have a particular subject-matter expertise.

Sometimes the Tribunal's natural desire to attract business may conflict with the goal of rendering decisions that will be widely respected. For example, in its first decision, the Tribunal ordered a coastal state to release a detained foreign flag vessel and its crew on the posting of a reasonable bond. The Tribunal set a low burden—an "arguable or sufficiently plausible" standard—that the applicant flag state had to satisfy with respect to one essential allegation in order for the Tribunal to rule in its favor.³¹ This standard may help to attract some submissions from states whose flag vessels have been detained by a coastal state. But, the standard arguably does violence to the balance the Convention strikes concerning the scope of permissible third-party oversight of coastal state activities in their EEZs, making it too easy to subject coastal state detentions of foreign flag vessels to international judicial review.³² In general, the Tribunal is most likely to gain support among its various audiences—international institutions, private parties, states, and national courts—called on to implement prompt release orders or other rulings if it does

29. *E.g.*, Memorandum of Understanding on Port State Control in the Caribbean Region, Feb. 9, 1996, 36 I.L.M. 231 (1996).

30. *See* Law of the Sea Convention, *supra* note 4, Annex VI, art. 15; International Tribunal for the Law of the Sea, Rules of the Tribunal, arts. 28-31, ITLOS/8, Oct. 28, 1997, <http://www.un.org/Depts/los/rules_e.htm>; Oceans and the Law of the Sea: Law of the Sea, Report of the Secretary-General, 52d Sess., Agenda Item 39, ¶ 37, U.N. Doc. A/52/487 (1997).

31. *See* The "M/V Saiga" (Saint Vincent and the Grenadines v. Guinea), ¶ 51, <http://www.un.org/Depts/los/judg_1.htm> (1997).

32. I develop this theme in John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. (forthcoming 1998).

not assert bold and innovative interpretations of the Convention, and if it exerts its authority only incrementally.³³

The scope of application of the third-party dispute settlement provisions of the Law of the Sea Convention will be broadened if they are incorporated by reference in other treaties. The 1995 Straddling Stocks Agreement already uses this technique.³⁴ Disputes concerning the interpretation or application of that Agreement can be pursued through the dispute settlement mechanisms of the Law of the Sea Convention. Thus, when that Agreement enters into force, each party to it and the United States is already a party—will be subject to the third-party dispute settlement mechanisms of the Law of the Sea Convention. This is true even for states (such as the United States) that have not accepted the 1982 Convention. Future bilateral and regional treaties also could authorize recourse to the dispute settlement mechanisms of the 1982 Law of the Sea Convention. Alternatively, of course, a treaty may simply confer jurisdiction on one particular tribunal, such as the Law of the Sea Tribunal.³⁵

In sum, the third-party dispute settlement provisions of the Law of the Sea Convention may lead to a gradual increase in judicial and arbitral activity, and thus to some important new contributions to the international law of the sea. The International Tribunal for the Law of the Sea, in particular, could see an increase in business if it acts with impartiality and demonstrates its ability to render well-reasoned decisions quickly and efficiently. Development of such a record could persuade states and other entities to use the Tribunal even when the Convention itself does not give the Tribunal residuary compulsory jurisdiction. States may refer disputes to the Tribunal via special agreements or compromissory clauses in treaties, and some non-state entities might also regard the Tribunal as their preferred dispute settlement forum.

33. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Mark W. Janis, *The European Court of Human Rights*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 105, 108-14 (Mark W. Janis ed., 1992).

34. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, arts. 7(4)-(6), 27-32, A/CONF.167/37, 34 I.L.M. 1542 (1995) (not yet in force).

35. E.g., Draft Agreement on Free Transit Through the Territory of Croatia to and From the Port of Ploce and Through the Territory of Bosnia and Herzegovina at Neum, Sept. 8, 1998, art. 9(2), Croat.-Bosn. & Herz. This Draft Agreement names the International Tribunal for the Law of the Sea as the body to nominate a member of a decision-making Commission, a nonjudicial matter over which the Tribunal arguably has jurisdiction under its Statute. See Law of the Sea Convention, *supra* note 4, Annex VI, art. 21. See also *id.* art. 282.